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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

T. W. MORGAN, WARDEN OF THE UNITED States Penitentiary at Leavenworth, Kans., appellant,
v.
ALFONSO J. DEVINE, ALIAS OLLIE DEvine, and Charles Pfeiffer, alias Chilli Pfeiffer.
No. 685.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF ON BEHALF OF THE APPELLANT.

STATEMENT OF THE CASE.

This appeal presents a single question. If, at the time of breaking into a post office, with intent to commit larceny (in violation of section 192, Penal Code), the entrant continues the transaction and actually steals property (in violation of section 190, same code), has he committed *two* offenses, or but *one*?

Sentenced on June 8, 1911, on pleas of guilty to an indictment charging violation, as a part of a single transaction, of each of those statutes under

separate counts and sentenced to *cumulative* terms under each count, the court below, on May 8, 1914, upon their petition for habeas corpus, ordered the petitioners discharged at the expiration of each sentence under the first (burglary) count. The facts appear more in detail in the memorandum opinion of the court. (R. 20–22.)

The statutes in question read as follows:

> SEC. 190. Whoever shall *steal, purloin,* or *embezzle* any *mail bag* or *other property* in use by or belonging to the Post Office Department, or shall appropriate any such property to his own or any other than its proper use * * * shall be fined not more than $200, or imprisoned not more than three years, or both.
>
> SEC. 192. Whoever shall *forcibly break* into, *or attempt to break into any post office* * * * *with intent to commit in such post office* * * * *any larceny or other depredation,* shall be fined not more than $1,000, and imprisoned not more that five years.

ARGUMENT.

Sections 190 and 192, supra, define, and prescribe penalties for, two distinct offenses.

Section 190 may be violated by a stamp buyer who, surreptitiously reaching inside the post-office delivery window, takes and carries away a package of postal cards; or by one who, at an unfrequented railroad station, miles removed from any post office, finds and appropriates a mail bag left on the platform.

Section 192, on the other hand, may be violated by one who, purposing to disable a rival's competitive stamp cancelling machine in use in the building, or one who, purposing through jealousy to assault the Federal night watchman, is caught attempting to force the lock of the post-office entrance. The fact conditions assumed under section 190 are no more divergent from those assumed under section 192 than are the two statutes each from the other. To attempt prosecution under section 192 in either of the first two cases would be as ridiculous as to attempt prosecution under section 190 in either of the last two instances. The single common element of the two groups is that each involves an offense against the Postal Service.

A recognized test of identity of offenses is this: Will the same minimum of evidence sustain each? While evidence of actual commission of larceny is admissible to prove *purpose* under section 192, it is by no means essential. The purpose may be proved otherwise than by its fulfillment. If caught while forcibly entering a post office, and with an empty money bag, or other suitable receptacle, and a letter offering to buy stamps from him, in his pocket, obviously the offender has, *at that moment*, and before committing either larceny or any other depredation, become liable to punishment under section 192.

Conversely, under section 190 it is immaterial whether the post office was entered forcibly or by right, or whether it was entered at all. It is no more essential to show that he entered a rear door with a

"jimmy" than a front door with a fur overcoat. Under section 190 property of the Post Office Department must be stolen—it matters not *where.* Under section 192, the post-office building must be broken into with purpose to steal or commit depredation but *without any need of accomplishing that purpose.* Simply because these two crimes were here committed in a continuous operation during the same night, it is argued that there was a miraculous disappearance of one or the other of these statutes, under cover of darkness.

Analyzing now the declared law.

Mr. Bishop in his New Criminal Law, Volume I, says:

> If in the night a man breaks and enters a dwelling house to steal therein, and steals, he may be punished for the two offences or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. *But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate* thing, and *thereon the defendant may be convicted and* sentenced *for both.* (Sec. 1062). * * * The test is whether, *if what is set out in the second indictment had been proved under the first, there could have been a conviction;* when there could, the second can not be maintained; when there could not, it can be (Sec. 1053, p. 630).

In the case at bar the second count charged larceny of stamps and funds belonging to the Post Office Department. Upon mere proof of such larceny there could not have been a conviction of burglary under section 192.

In *Ex parte Peters*, 12 Fed. 461, a case involving an indictment, a plea, and cumulative sentences, like those in the case at bar, the court said:

> The question tersely stated is whether it was competent for the district court to sentence the petitioner for both burglary and larceny, charged in separate counts, but both appearing to be part of the same act. * * * According to the great weight of authority, *it may be regarded as settled* that a person who breaks and enters a house with intent to steal therefrom, and actually steals, *may be punished* under separate indictments *for two offences*, or one, at the election of the power prosecuting him. I Bish. Crim. Law, 1062, and cases cited (463) * * * The opposite view was ably stated by Waite, C. J., in his dissenting opinion in Wilson *v.* State 24 Conn. 57, and his reasoning is so strong that if it were a question of first impression, I should be inclined to adopt his opinion. Looking however, to the adjudicated cases, I find the law to be very well settled against the position assumed by the counsel for petitioner. (464.)

The so-called "able statement" (in dissent), invites analysis. It is bedded upon another Connecticut decision to the effect that, under a statute making it a crime for a person to have in his possession a counterfeit

bill, a person having in his possession *two* counterfeit bills can not be convicted of two separate offences; and it is said that an assailant striking several blows in rapid succession, is answerable to only one sentence for assault. Agreed; but neither illustration is in point. The analogy properly applied here, would be as follows: It being a crime to steal a mail bag, one stealing 100 at the same time, can not receive 100 sentences.

It would be futile to attempt extended consideration of State court decisions. These, as well as the Federal decisions, simply establish a well-defined conflict. *Ex parte Peters, supra,* was followed in *Anderson* v. *Moyer,* 193 Fed. 499, and in *Munson* v. *McClaughry,* the latter an unreported decision by Judge Pollock.

In *Anderson* v. *Moyer,* the court said (505):

> My view of the matter, gathered from the authorities, is, that if there is a charge of burglary and larceny in a single count in the indictment, and there be a general verdict of guilty on such count, the court can only impose one sentence, and cannot sentence for both; but, if the burglary be charged in one count in an indictment, and larceny, even though committed on the same day, and *even though committed at the time of breaking and entering, be charged in another count,* and there is a verdict of guilty on both counts, and where either offense would be complete without the necessity of proving the other—certainly where it is not necessary to prove even

an ingredient of the other—then there may be a separate sentence on each count.

As a basis the court quotes approvingly and at length from Judge Pollock's opinion in the *Munson* case, *supra*. The *Munson* case was subsequently reversed in the Circuit Court of Appeals, 198 Fed. 72, on the authority of *Halligan* v. *Wayne*, 179 Fed. 112, which holds squarely that on a general verdict of guilty under counts charging burglary and larceny, there may be sentence for burglary only. And, of course, Judge Pollock was compelled to follow this specific reversal of his earlier opinion, when he decided the case at bar. Upon the *Munson* case being reversed, the petition for writ of *habeas corpus* in the *Anderson* case, *supra*, was renewed, and the District Court was constrained, under the ruling of the *Munson* and *Halligan* cases, to reverse its decision. The case was then taken by the Government to the Circuit Court of Appeals for the Fifth Circuit, and that court, refusing to determine the main question here at issue, reversed the court below on the narrow ground that *habeas corpus* was not a remedy available in such a case.

The Government contends that the principle of *Halligan* v. *Wayne* and its successor cases, is wrong and untenable; and that the principle established by the reasoning of *Ex parte Peters*, *supra*, has been adopted by this court.

In *Burton* v. *United States*, 202 U. S. 344, this court applied the very principle we here contend for. Burton was convicted and sentenced upon two counts

in an indictment—one charging him with *agreeing to receive*, and the other with *actually receiving*, compensation in violation of a law providing that—

> No Senator * * * shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered, etc.

This court said (377):

> Another point made by the defendant, is that he could not legally be indicted for two separate offences, one for agreeing to receive compensation in violation of the statute and the other for receiving such compensation. This is an erroneous interpretation of the statute, and does violence to its words. It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation, separate distinct offences * * *.
>
> There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offence. Or compensation might be received for the forbidden services without any previous agreement and yet the statute would be violated. * * * But Congress *intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied.* Therefore an agreement to receive compensation was made an offence. So the receiving of compensation in violation of the statute whether pursuant to a

> previous agreement or not, was made another and separate offence. There is in our judgment no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the legislature, not the court, which is to define crime and ordain its punishment" (citing cases).

In *Carter* v. *McClaughry*, 183 U. S. 365, this court held that a person could be punished cumulatively for (1) conspiring to defraud the United States, and (2) for causing false and fraudulent claims to be made against the United States, even when *the two charges grew out of one and the same transaction.* The court said (394):

> The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is *required* to sustain them be applied. The first charge alleged "a conspiracy to defraud", and the second charge alleged "causing false and fraudulent claims to be made", which were separate and distinct offenses, one requiring certain evidence which the other did not. *The fact that both charges related to and grew out of one transaction made no difference.*

In the instant case proof of larceny is *required* to sustain conviction under section 190, and not under 192. While proof of breaking into a post office is required to sustain conviction under section 192 and not under 190.

In the *Carter* case *supra*, and in the *Gavieres* case, *infra*, this court approvingly quoted *Morey* v. *Commonwealth*, 108 Mass. 433, as follows:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, *unless the evidence required to support a conviction upon one of them would have been sufficient to warrant conviction upon the other.* The test is not whether the defendant has already been tried for *the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute, does not exempt the defendant from prosecution and punishment under the other.*

In *Gavieres* v. *United States*, 220 U. S. 338, defendant was convicted and sentenced in the Court of First Instance of Manila, for violating a section of the Philippine Penal Code, making it a crime to insult a public official. He had been convicted previously, *because of the same words and conduct* under an ordinance of the City of Manila which forbade boisterous conduct in a public place. This court said:

> It is to be observed that the protection intended, and specifically given, is against second jeopardy for the *same* offense (341) * * *. *It is true that the acts and words of the accused set forth in both charges are the same;* but in the

> second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different (342). * * * Applying these principles it is apparent that evidence sufficient for conviction under the first charge, would not have convicted under the second indictment. In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence, or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of *insult to a public official* was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place, open to public view; the insult to a public official need only be in his presence, or addressed to him in writing. Each offense required proof of a fact which the other did not. Consequently a conviction of one would not bar a prosecution for the other. (343–344.)

In the case at bar the "conduct" on which the prosecution was based was more complex in its elements than that involved in the *Gavieres* case, and hence should support, *a fortiori*, conviction under two statutes. In the *Gavieres* case a few boisterous words happened to be spoken in a *public place*, which latter feature constituted them an offense against the city ordinance. The object of

abuse happened to be an *insular official*, which brought the accused within the operation of the Insular Penal Code. But "the act" or "transaction" was the single utterance. In the instant case, on the contrary, defendants performed two distinct operations. They broke into the post office, intending to steal; and then actually committed larceny. It may be said that whatever they did was the part of the same transaction; but "the act" of stealing money and stamps was entirely distinct from that of battering down the door of the Federal building.

The so-called "test of identity" of offenses may be stated conversely. Instead of asking, as in the Gavieres case, supra, whether evidence sufficient for conviction under the first charge would necessarily have convicted under the second, we may inquire whether an acquittal upon one charge would necessarily carry with it an acquittal upon the other. The absence of "identity of offenses" in a case like the case at bar appears in no light more clearly than in this. Upon all the evidence, in the trial of an indictment charging in two separate counts, burglary and larceny, a jury might well find the defendants guilty of breaking with intent to steal and innocent of larceny; or, on the other hand, guilty of the theft without finding that the building had been forcibly entered.

CONCLUSION.

The court below erred in ordering appellees' discharge from custody upon the satisfaction of the sentence under the first count. The order of the court should be reversed, and the appellees committed to the penitentiary to serve the sentence imposed under the second count.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

FEBRUARY, 1915.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

T. W. MORGAN, WARDEN OF THE UNITED States Penitentiary at Leavenworth, Kansas, appellant,
v.
ALONZO J. DEVINE, ALIAS OLLIE DEVINE, and Charles Pfeiffer, alias Chilli Pfeiffer.
} No. 685.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY BRIEF FOR APPELLANT.

The entire argument of appellees is to the point that if in a single continuous transaction there be *one common element* of those essential to constitute a violation of each of two statutes, there is but one offense in law, though all the other elements under each statute are diverse. On page 16 of their brief they assert—

> That separate punishments can not be inflicted for offenses of the *same nature*, committed at the same time or as a part of the same continuing criminal act. * * * When

> each offense—as defined by the law—has *one* or more indispensable elements which are identical, the offenses *are by nature the same.*

This is an absolute reversal of the rule declared by this court, viz: If there be a single element in each not essential to the other, they amount to separate crimes. What would become of the case of *Ryan* v. *United States*, 232 U. S. 726, under this rule? There was a conviction both for the offense of planning to transport the dynamite, and separately for the completed act of transporting; all continuing over a period of several years. They undertake to support this assertion by *Triplett* v. *Commonwealth*, 84 Ky. 193. The latter case relied upon the *Wayne* case and the *dissenting* opinion in *Wilson* v. *State*, 24 Conn. 57. This court in the *Burton* case, 202 U. S. 381, relied upon the *majority* opinion in the same (*Wilson*) case.

Appellees also insist that the *Grafton* case, 206 U. S. 333, sustains their contention. The Fifty-eighth Article of War prescribed "punishment in any such case * * * not less than * * * for the *like offense* by the laws of the State, Territory, or District in which such offense may have been committed." (341.) The question involved, as appears from the briefs of counsel and the opinion of the court, was not duality, but rather degree of offense, and whether trial by court-martial barred trial by civil courts for the *same* criminal act. The offense of homicide was wholly *included* in that of assassination. *Every* element of the former was

contained in the latter. Speaking of the court-martial trial, this court said:

> *The act done is a civil crime and the trial is for that act.* The proceedings are had in a court-martial because the offender is *personally* amenable to that jurisdiction, * * * (347). That he will be punished for the identical offense of which he has been acquitted if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for "an infraction of article 404 of said Penal Code and of the *crime of homicide*" (349). * * * Looking at the matter in another way, the above suggestion by the trial judge could only mean that simply because, speaking generally, the civil court has jurisdiction to try an officer or soldier of the Army for the crime of assassination, it may yet render a judgment by which he could be subject to punishment for an offense *included* in the *charge* of *assassination*, although of such lesser offense he had been previously acquitted by another court of competent jurisdiction. This view is wholly inadmissible. Upon this general point the Supreme Court of the Philippines, referring to the defense of former jeopardy, said: "The circumstance that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory. The identity of the offenses is determined, not by their grade, but by their nature. One crime may be a *constituent* part

of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy." The offense, homicide or manslaughter, charged against Grafton was the unlawful killing of a named person. The facts which attended that killing would show the degree of such offense, whether assassination, of which the civil court might take cognizance if it acquired jurisdiction before the military court acted, or homicide, of which the military court could take cognizance if it acted before the civil court did. If tried by the military court for homicide as defined in the Penal Code, and acquitted on that charge, the guaranty of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused if on trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.

In Chitty's Criminal Law, vol. 1, pp. 452, 455, 462, the author says: "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other. (349–350.)

* * * It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses—one against military law and discipline, the other against the civil law which

> may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We can not assent to this view. It is, we think, inconsistent with the principle, already announced, *that a* general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. (351.)

Applying the test declared by Chitty and approved by this court as above, would acquittal of larceny in this case have demonstrated that they could not have been guilty of burglary, or *vice versa*? Manifestly not. For though they stole property appellees must have been acquitted of burglary if the proof showed they had entered on invitation of the postmaster or through an open door. And though they broke the door to enter they must have been acquitted of larceny if the proof showed that a person other than they took the property.

It is asserted that there was no single common element in the *Gavieres* case. On the contrary, the common element was "misbehavior in deed and words." (220 U. S. 342.) The Penal Code read:

> Those who * * * insult or threaten by deed or words public officials or agents of the authorities in their presence—etc.

The ordinance read:

> No person shall * * * behave in a * * * rude * * * manner in any public place, open to public view, or * * * behave in a * * * rude * * * manner in any place, to the annoyance of another person.

This court said that *each* offense "had an element not embraced in the other"—not that they "had no common element." The argument as to single common element is fully answered by this court's quotation (p. 342) from the *Morey* case—found also on page 10 of appellant's brief. Yet appellees assert (their brief, p. 19) that the *Morey* case "is contrary, both in decision and principle, to decisions and authorities laid down by this court." The *Gavieres* case involved a single continuous transaction which, as here, reached two statutes. Appellees assert (their brief, p. 14) that singleness of intent (to steal) is the common element forbidding double offense.

In *United States* v. *Holte*, 236 U. S. 140, the single and common intent to feloniously transport was present in the man both in planning and in transporting; yet neither in the majority or minority opinion of this court was it even suggested that this single common intent would forbid punishing the man for each, the conspiracy and the transportation. As already said, the *Ryan* case involved both in the conspiracy and in the after transportation, a single purpose common to both to transport the dynamite.

In the *Burton* case, 202 U. S. 381, the agreement was made with intent to receive the bribe, and there was a later receiving. Here the burglary was with intent to steal, and there was an after stealing. The attempt of appellees (their brief, p. 24) to distinguish the latter case on the feature of intent alone is futile.

There is no statute defining "breaking *and* stealing" as a single offense. If there were, it would be conceded that such single offense could not be broken into fragments to make separate crimes.

While the robbery cases (appellees' brief, p. 23) come from States holding contrary to this court on the main question, they are further distinguished on the ground that there is every element of larceny necessarily included in the definition of the crime of robbery. The illustration as to the several blows struck in the single assault is fully explained in the brief for the Government filed in the *Ebeling* case, No. 736, October term, 1914, next for argument.

The true rule, and the rule adopted by this court, is as stated in that part of the quotation from sec. 1062 of Bishop's New Criminal Law (found in appellant's brief, p. 4, and in appellees' brief, p. 29), dealing with the *declared law*. And the indictment here was drawn so as to charge in the first count burglary only, and in the second count larceny only, thus conforming strictly to the rule of procedure announced by the author. The latter's criticism and the dissenting opinion in the *Wilson* case (appellees' brief, p. 30) should hardly make for reversal of a doctrine so well established in this court.

The *Snow* and *Nielson* cases involved a statute punishing *continuous conduct as the unit of offense.* That question is fully discussed in the brief of the Government in the *Ebeling* case, *supra.*

Because of *Anderson* v. *Moyer,* 193 Fed. 499, 203 Fed. 881, on the one hand, and *Munson* v. *McClaughry,* 198 Fed. 72, on the other hand, if a Federal prisoner convicted of both post-office burglary and larceny be confined in the penitentiary at Atlanta he must serve both sentences; but if confined at Leavenworth he gains release by habeas corpus at the expiration of the first sentence. The result is that prisoners affected thereby are applying for transfer from the former to the latter penitentiary in order to thus gain their release.

To sustain appellees' contention would be to substitute for section 189 of the Penal Code a new statute covering combined burglary and larceny in terms, thereby making one offense where the present statutes have made two. This would seem to be judicial legislation.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

APRIL, 1915.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

United States Circuit Court of Appeals

No. 685.

OCTOBER TERM, 1914.

T. W. MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS, Appellant.

vs.

ALONSO J. DEVINE, alias OLLIE DEVINE and CHARLES PFEIFFER, alias CHILLI PFEIFFER, Appellees.

Appeal from the District Court of the United States for the District of Kansas.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

At the June, 1911, term of the District Court of the United States for the Eastern Division of the Southern District of Ohio, appellees were indicted in two counts by the grand jury. The first count was drawn under section 192 of the Penal Code of the United States and charges that the petitioners (appellees), on "the 13th day of January, 1911, in the County of Delaware, in the State of Ohio, did then and there unlawfully and forcibly break into and enter a building used in whole, as a post office of the United States, at Powell, Delaware County, Ohio, with intent then and there to commit larceny in such building and post office, to-wit,—to steal and purloin property and funds then and there in use by and belonging to the Post Office Department of the United States."

The second count was drawn under section 190 of the Penal Code and charges that the petitioners (appellees) on the same date and at the same place, "did then and there unlawfully and

knowingly steal, purloin, take and carry away certain property and moneys of the United States, then and there in use by and belonging to the Post Office Department of the United States, to-wit,—postage and postal funds—." (R. pp. 5, 13, 20-21).

Upon pleas of guilty having been entered by both of the appellees the trial court sentenced one of the appellees to confinement in the United States Penitentiary at Leavenworth, Kansas, "for the term of four years on the first count of the indictment,' and for a period of two years on the second count of the indictment, "said sentences to be cumulative and not concurrent." The other appellee was given like sentences for three and one-half years' confinement and a fine of one hundred dollars under the first count, and two years under the second count. (R. pp. 6, 10 and 21). **It is conceded that the acts set forth in the second count of the indictment were performed by appellees while in the post office building under the entry charged in the first count.**

Having served the greater part of their sentences under the first count of the indictment, appellees brought their petition in the Court below, asking that the writ of habeas corpus issue from said court, ordering their discharge from confinement at the expiration of the sentence under the first count. The writ was granted by the court, and on May 8, 1914, it was ordered and adjudged that appellees be discharged "from imprisonment at the expiration of their term of confinement under the first count of the indictment." (R. p. 22.)

To this order and judgment the appellant took exceptions and now seeks to have same "reversed, set aside and held for naught."

Two questions are presented to the Court:

FIRST: Does the prohibition against double jeopardy as set forth in the Fifth Amendment to the Constitution, permit a court of the United States to impose, (1) a punishment and sentence for breaking into and entering a post office "with intent to commit larceny, to-wit,—to steal and purloin property and funds" of the Post Office Department, and (2) a separate and cumulative sentence and punishment for the unlawful "stealing and purloining, taking and carrying away" of that property, done at the same time and as a part of the same transaction?

SECOND: Assuming that the first question should be answered in the negative, may the prisoner, at the expiration of the first sentence, obtain by habeas corpus, his release from further punishment?

We shall discuss these questions in inverse order, because the second must be answered in the affirmative, before the prisoner has any standing in court to present the first.

No assignment of error was made in the Court below, nor point made in the appellant's brief as to the second of these questions, but the appellee deems it advisable to correlate the authorities and review some of the principles for this Court, upon this question—Especially is this advisable in view of the fact that one of the lower Federal courts has held in a similar case that habeas corpus could not be invoked by these appellees; but a writ of error should have been taken from the decision of the committing court:—and having neglected to do this, they can find no relief by habeas corpus.

Moyer v. Anderson (C. C. A. 5th Cir. 1913) 203 Fed. 881—Even the appellant in this case refers, in his brief, to that decision as being based on a "narrow ground." (Brief p. 7.)

ARGUMENT.

It is indisputable that if the second count of this indictment, as to the stealing and purloining of the property places the defendant twice in jeopardy for the same offense, any punishment or sentence on this charge is contrary to the express provision of the Constitution, and is, therefore, beyond the jurisdiction of the court. It must follow that such a sentence or punishment is void. And it is equally well settled that the writ of habeas corpus is always to release one held in custody under a judgment which is void, because it is beyond the jurisdiction of the court.

I. Bailey, Habeas Corpus Sec. 2.
Ex parte Lange (1874) 18 Wall. 163.
Ex parte Virginia (1879) 100 U. S. 339, 343.
Ex parte Rowland (1882) 104 U. S. 604.
Ex parte Snow (1887) 120 U. S. 274.
Hans Nielson, Petitioner, (1889) 131 U. S. 176.

See Henry vs. Henkel (1914) 35 Sup. Ct. Rep. 54.
In re Bonner (1894) 151 U. S. 242.
Ex parte Mayfield (1891) 141 U. S. 207.

While it is repeatedly stated that habeas corpus cannot be used as a substitute for a writ of error, and that errors of law committed by the trial court should be corrected by appeal or writ of error and not by the collateral proceeding of habeas corpus; the courts have always recognized that **the cause of the detention of the petitioner** may be questioned by this proceeding. And in ascertaining the cause, inquiry may be directed to the **jurisdiction** of the committing court. If the investigation discloses that the court was without jurisdiction to commit the prisoner to the custody of the detainer, his release shall be ordered.

See authorities cited above.

Habeas corpus "is in the nature of a writ of error to examine the legality of the commitment, detention or restraint; the proper remedy for all unlawful imprisonment both in civil and criminal cases."

Bailey, Habeas Corpus Sec. 2.

This principle is well expressed by this court in **Ex parte** Virginia (1879) 100 U. S. 339, 343. "While, therefore, it is true that a writ of habeas corpus cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an **order beyond the jurisdiction of an inferior Federal Court to make this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all."**

Within the meaning of this principle of practice, habeas corpus is the proper mode of proceedure to question any of the essential and indispensable elements of jurisdiction. By habeas corpus the jurisdiction of the court (1) e. c. of the person, (2) of the offense or subject-matter, or (3) its power to pass the particular judgment, may be examined.

I. Bailey, Habeas Corpus, p. 179.
Ex parte Rowland, (1882) 104 U. S. 604.
Ex parte Ayers (1887) 123 U. S. 443.
Ex parte Bain (1887) 121 U. S. 1.

Hans Nielson, Petitioner (1889) 131 U. S. 176.
In re Bonner (1894) 151 U. S. 242.

And, if it appear, upon the inquiry and examination, that the court committing the prisoner, did not have jurisdiction of each and all of the foregoing elements, the commitment and detention thereunder are unlawful and void. There can be no lawful imprisonment of a person under the order of any court which has not jurisdiction over, (1) the person of the accused; (2) the cause or crime of which he is accused; and (3) **power to pass the particular order or judgment of commitment.** It is with the last that we must deal on this appeal.

And nothing can be more obvious than this, that if we assume that the Constitutional prohibition against double jeopardy prohibits the sentence and punishment under the second count of this indictment, the District Court in Ohio, which passed the sentence of commitment was without "power to pass the particular order or judgment of commitment." And it must follow that the writ of habeas corpus was properly granted by the court below.

Let us, therefore, examine the soundness of the premise on which this argument is founded, viz:

That the writ of habeas corpus will be issued and the prisoner discharged, if it appear that the committing court, having jurisdiction both of the person and the cause, had no power to pass the order or judgment of commitment. This is well established by the courts in general and by this court in particular.

No clearer or more accurate statement of the principle is to be found than that made in Sec. 258 of Black on Judgments (2nd ed),—where after a discussion of the contrary position the author proceeds: "But the argument is far from satisfactory. It involves the error of overlooking the **fact that jurisdiction to render the particular sentence imposed is equally as essential to its validity as jurisdiction of the person or the subject-matter.** If either of the three elements is wanting, the judgment is a nullity. Now in respect to the sentence, the court has precisely the jurisdiction which the statute gives it, no more and no less. And if the statute prescribes that the sentence shall be for not less than three years, the court is utterly without power to sentence for one year. This seems too plain for argu-

ment. And indeed the great preponderance of authority sustains the proposition that if the Court **has not jurisdiction to render the particular sentence,—if the sentence is different from that prescribed by the law, or is below the minimum or above the maximum,—that is good ground for releasing the prisoner on habeas corpus."**

Ex parte Cox (1893) 3 Idaho 530.
Ex parte Bulger (1882) 60 Col. 438

The New York Court of Appeals laid down this rule in **People ex rel Tweed vs. Liscomb** (1875) 60 N. Y. 559, where a petition for habeas corpus was brought at the expiration of the period of the sentence on the first count, alleging that the court had no power to impose any punishment upon the other counts in the indictment because of the constitutional prohibition against double jeopardy. It was held that the writ should have been granted and the prisoner discharged. At page 568 the court says:

"It matters not what the general powers and jurisdiction of a court may be; **if it act without authority in the particular case, its judgments are mere nullities, and not voidable, but simply void,**—protecting no one acting under them, and constituting no hindrance to the prosecution of any right. * * * There is nothing startling in the application of these well recognized principles to proceedings by the **habeas corpus**, in favor of the citizen restrained of his liberty, under the color of judicial proceedings, absolutely void. Neither should the **habeas corpus** act which the judges have reversed as the bulwark of the Constitution, the **magna charta** of personal rights,' be shorn of its power and its glory by a subtle and metaphysical interpretation; rather should it receive a liberal construction, in harmony with its grand purpose, and in disregard, if need be, of technical language used." And at pages 590-2 "The power of the Court and the payment of a fine for $250.00 * * * The jurisdiction over the person of the condemned was exhausted, and as if no prosecution had ever been instituted against him. The purpose of the prosecution and of the indictment had been accomplished.

"A party held only by virtue of the judgments thus pronounced, and therefore, void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error. but may be released by **habeas corpus**. It will not answer to

say that a court having power to give a particular judgment not authorized by law, and contrary to law, is merely voidable and not void, and must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of rights and the Constitution, and creating a judicial despotism. It would be a defeat of justice, nullify the writ of **habeas corpus** by the merest technicality, and be the most artificial process of reasoning."

Since the question at issue in the New York case is identical with that now before this Court, we will quote a further passage from the opinion, which a famous text writer on habeas corpus states to be the "True doctrine". (See I Bailey, Habeas Corpus, page 179.)

"No court can give a judgment, valid for any purpose not authorized by law. A prisoner condemned for grand larceny for which the statutory punishment is imprisonment in the state prison for a term not exceeding five years, and who is sentenced for ten years, is not held by due process of law or the judgment of a court of competent jurisdiction. No court is or can be competent to pronounce a sentence and give judgment in open and palpable violation of a positive statute; and a judgment so given is simply void. **If a court having jurisdiction of the person of the accused and of the offense with which he is charged, may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except upon writ of error, it is but a judicial suspension of the writ of habeas corpus."**

This Court has repeatedly announced the same principle, and the following cases are in point:

Ex parte Lange (1874) 18 Wall 163.
Ex parte Virginia (1879) 100 U. S. 339.
Ex parte Rowland (1882) 104 U. S. 604.
Ex parte Ayers (1887) 123 U. S. 443.
Ex parte Bain (1887) 121 U. S. 1.
Ex parte Snow (1887) 120 U. S. 274.
Ex parte Coy (1888) 127 U. S. 731.
Hans Nielson, Petitioner (1889) 131 U. S. 176.
In re Bonner (1894) 151 U. S. 242.

And in the lower Federal Courts, according to the better view, the doctrine has been followed with almost unanimity **Stevens vs. McClaughry,** (C. C. A. 8th Cir. 1913) 207 Fed. 18;

Munson vs. McClaughry, (C. C. A. 8th Cir. 1912) 198 Fed. 72; **Halligan vs. Wayne** (C. C. A. 9th Cir. 1910) 179 Fed. 112.

The Circuit Court of Appeals for the Fifth Circuit reached a contrary result in **Moyer vs. Anderson** (1913) 203 Fed. 881. But the decision cannot be reconciled with the adjudicated cases and is contrary to the principles as laid down by this Court.

The case of **Exparte Lange, supra,** is squarely in point. The committing court had passed a sentence in excess of its authority, and later, during the same term, sought to recall its action; without putting the prisoner in **statu quo,** passed a new sentence according to its lawful authority, this Court discharged the prisoner on **habeas corpus.** And the following excerpt from the opinion clearly shows that habeas corpus is the proper remedy in this cause, now before the Court. For according to the contention of the appellees the trial court in Ohio had exhausted its power when it sentenced them under the first count:—at page 175, "But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but now void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.

"But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous **because** it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes.

"We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him the power of the court to punish him further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the secon l sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered a five days' imprisonment on account of the other. It thus showed the court that **its power** to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and of the common law, for the protection of personal

rights in that regard, are a nullity, the authority to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. **It was error, but it was error because the power to render any further judgment did not exist.**

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however, erroneous it may be, any judgment the Court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment."

So in the case at bar the sentence on the second count of the indictment was beyond the jurisdiction and power of court, because it had exhausted its constitutional power when it punished the appellees **once for the same offense,**—and the writ of habeas corpus may properly be invoked to secure their release.

The principle of the **Lang Case** is recognized as sound by this court today. See **Henry vs. Henkel** (Nov. 30, 1914) 35 Sup. Ct. Rep. 54.

The decision in **Ex parte Rowland** (1882) 104 U. S. 604, is in accord with this contention of the appellees. There the question was the use of habeas corpus to secure the release of one committed for contempt for a refusal to obey an order by mandamus issued by a certain court of commissioners. It was held that since the court of commissioners had no power to issue such mandamus, the petitioner was unlawfully committed and habeas corpus was a proper mode of securing his release, although there was ample jurisdiction of the person and of the subject-matter.

The decision was re-affirmed in **Ex parte Ayers** (1887) 123 U. S. 443; and in **Ex parte Bain** (1887) 121 U. S. 1.

We now come to the discussion of two cases decided by this court, which it has never seen fit to alter or repudiate, and which clearly determine this question in favor of the appellees. They are **Ex parte Snow** (1888) 120 U. S. 274, and **Hans Nielson, Petitioner** (1889) 131 U. S. 176.

The **Snow Case** was twice before this court, the first time it was held that this Court had no jurisdiction to review by writ of error from this court a decision of the Supreme Court of the Territory of Utah, which had sustained 3 convictions under the act of March 3, 1882, prohibiting unlawful cohabitation. See 118 U. S. 346. The second time, the case was brought to this Court on appeal from an order of the District Court of Salt Lake County, Utah, denying a writ of habeas corpus, upon a petition filed at the expiration of the first sentence. Petitioner claimed that he had committed but ONE offense, and that the trial court had no power to pass judgment and sentence, except for **one offense**; whereas, in fact the single offense had been divided into three charges, and the court had imposed three separate sentences.

It was held that the writ of habeas corpus should have been granted and petitioner released from custody and restraint under the execessive sentence. In its opinion the court said:

"There can be but one offense between such earliest day and the end of the continuous time embraced by all of the indictments. Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but as the want of jurisdiction appears on the face of the judgment, the objection may be taken upon **habeas corpus** when the sentence on more than one of the convictions is sought to be enforced."

In the case of **Hans Nielson, Petitioner**, the identical question was presented to this Court, as in the case at bar, and the decision was in favor of the issuance of the writ. Nielson had been sentenced under two indictments, and, having completed his term of imprisonment under the first, he asked for a writ of **habeas corpus** to obtain a discharge, claiming that the offenses charged in each indictment were identical, and the second sentence was void, being a second punishment for the same offense.

This court decided that the offenses were identical and that habeas corpus was the proper remedy. It said in part:

"In the present case, it is true, the ground for the **habeas corpus** was, not the invalidity of an act of congress, under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the constitution; in other words, a constitutional immunity of the

defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constittutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; **but in the other it has no authority to render against the defendant."** Again the court states after an exhaustive review of the authorities: But, "with regard to the power of discharging on **habeas corpus** it is generally true that after conviction and sentence the writ only lies when the **sentence exceeds the jurisdiction of the court,** or there is no authority to hold the defendant under it. **In the present case the sentence given was beyond the jurisdiction of the court because it was against an express provision of the constitution which bounds and limits all jurisdiction."**

There has been no retrenchment by this court from its position taken in the foregoing decisions. The Circuit Court of Appeals in the Eighth Circuit has recently had opportunity to review the authorities on this point; and from the able and learned opinion of that court in the case of **Stevens vs. McClaughry** (1913) 207 Fed. 18, it seems to be incontrovertible that habeas corpus was the proper remedy in the case at bar, as much so as in the **Lange, Snow and Nielson cases.** The decision of the Circuit Court of Appeals in the 5th Circuit in **Moyer vs. Anderson** (1913) 203 Fed. 881, to the contrary notwithstanding.

In this last case the Court relied upon decisions of this Court which were neither controlling or in point. They are:

Matter of Spencer (1913) 228 U. S. 709 (which involved the application to Federal Courts for habeas corpus to review certain proceedings in a **State court;** and the application was made before he had served his LAWFUL sentence.)

Glascow vs. Moyer (1912) 225 U. S. 753 (where the **Court** had jurisdiction of the case, the accused, and the power to pass the judgment.)

Johnson vs. Hay (1913) 227 U. S. 245 (where release by habeas corpus was sought **before the trial** in the lower court.)

The decision of none of these cases in nowise contravenes the rule of practice contended for in the case at bar.

The doctrine of the **Anderson** case was expressly repudiated in the **Stevens** case, and it seems correctly so, when we recognize the foregoing principles, viz: (1) that habeas corpus is always available to question a detention under a judgment passed in excess of the jurisdiction of the court.

(2) A judgment or sentence which violates an express provision of the Constitution is beyond the jurisdiction of the court.

Consequently when a court by its sentence twice punishes the prisoner for the same offense, he may obtain relief by habeas corpus

We are thus irresistably brought to the conclusion that the second question should be answered in the affirmative.

AS TO THE FIRST QUESTION.

Did the Trial Court in Ohio have the power under the constitution to impose the sentence of imprisonment on the second or larceny count of the indictment?

It was the decision of the Court below, and is the contention of the appellees here, that when the trial court imposed the sentence of imprisonment, etc., under the first or burglary count, its power to punish the appellees for any further charge in this indictment was completely exhausted; and that the sentence imposed under the second count was in violation of the Fifth Amendment, and therefore, void. The soundness of this decision depends upon whether the crime charged in the first count and that charged in the second count constitute "the same offense" within the meaning of the Fifth Amendment which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

This question is to be answered by an examination of **this indictment and record in this case**, and not by what **possible** charges and allegations **might** have sufficed to sustain a conviction under Sections 190 and 192 of the Penal Code. This Court is not concerned with **what might have been done,** but only with **what was actually done,** by the parties and courts in this case.

Consequently the illustrations, on pages 2, 3 and 4 of the Appellant's Brief, referring to the different ways, charges and allegations by which a violation of these statutes **might have been** consumated, are not applicable, and throw no light upon the solution of this question at issue. The sole point is how did the prosecution **in this case** proceed with its charges, and could the court lawfully impose separate and distinct punishment for **these charges as alleged?**

Let us, therefore, examine the record to see if **these charges,** made in separate counts of this indictment, constitute "the same offense."

The first count charges that the appellees on January 13, 1911, at Powell, Ohio, "did * * * unlawfully and forcibly break into and enter a building used in whole as a post office of the United States * * * **with intent then and there to commit larceny in such building and post office, to-wit,—to steal and purloin property and funds then and there in use by and belonging to the Post Office Department of the United States.** (R. pp. 5, 13 and 22). This is an indictment under Section 192 of the Penal Code which is as follows:

"Whoever shall forcibly break into or attempt to break into any post office, * * * **with intent to commit in such post-office, * * * any larceny or other depredation,** shall be fined not more than one thousand dollars and imprisonment for not more than five years."

The second count charges that the appellees at **the same time and place,** "did * * * unlawfully and knowingly **steal, purloin, take and convey certain property and moneys of the United States, then and there in use by and belonging to the Post Office Department of the United States,** to-wit, postage stamps and postal funds * * * the said property and moneys of the United States then and there being located in the post-office * * * at Powell, * * * Ohio." (R. pp. 5, 13 and 21.) This is an indictment under Section 190 of the Penal Code which is as follows:

"Whoever shall steal, purloin, or embezzle any mail bag or other property in use by and belonging to the Post-Office Department, * * * or shall carry away any such property * * * shall be fined not more than two hundred dollars, or imprisonment not more than three years or both."

It is agreed that the acts of stealing, purloining, taking and carrying away of the property, so charged in the second count, were all done **"at the same time in said post-office, under one entry of the said building;" and that said acts were all performed while appellees were "in said post office under the entry set forth in count one of the indictment."** (R. pp. 13 and 22). In other words, it is conceded

(1) **That the offenses charged in the first and second counts were parts of the same transaction, i. e. were parts of the same continuing criminal act;**

(2) That the specific intent, indispensable to a violation of Section 192 of the Penal Code, and set forth in the first count, was **in fact,** identical with the intent necessary to complete the charge under Section 190, as set forth in the second count * * * And in this case under this indictment in order to sustain a conviction on the second count, the Government would have been compelled to prove the intent "to steal and purloin property and funds * * * in use of and belonging to the Post Office Department;" and this intent is identical with that already proved and punished under the first count and sentence thereon.

The decision of the court below and the contention of appellees proceed, not upon the theory that, in no case, may there be two separate offenses committed and punished, **where they are parts of the same transaction.** Thus, the quotation on page 9 of appellants brief, taken from **Carter vs. McClaughry** (1902) 183 U. S. 365, is indisputably sound, as applied to the facts before the Court in that case. The same may be said of the case of **Burton vs. United States** (1906) 202 U. S. 344.

Nor do the appellees contend that in no case, may two separate punishments be inflicted for violations of Sections 192 and 190 of the Penal Code. But they do contend that such questions are not involved in this case, nor necessary to its decision.

The intent to take the government's property was **identical in** and **indispensable** to each count. And the fact that the offenses were **committed in the same transaction** simply shows that the **intent,** in each case, was **in fact the same.** If the indictments had been for a breaking and entry at another place or at a different time from the stealing, purloining and carrying

away, the intents, necessary to the charges, while **in law** the same, **in fact** they would have been separate and distinct. And, of course, the offenses would not have been the same. **In the case at bar this intent was both in law and in fact, identical in and indispensable to each count of the indictment**; and when the trial Court in Ohio imposed a punishment under the second count it was twice punishing appellees for the same intent for which they had already been punished under the first count.

The decision of the Circuit Court of Appeals in the 8th Circuit in the case of **Munson vs. McClaughry** (1912) 198 Fed. 72, is in point. The facts are identical with those in this case. In speaking of the element of intent the Court says (p. 74):

"A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or break into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his **criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act.**"

May the prosecution divide this single continuing criminal act, inspired by the same intent, into innumerable crimes, and in each division, again inflict a punishment for that indispensable intent? In this case the court below said "No." In the **Munson** case the Circuit Court of Appeals said "No;" and so said the same court in **Stevens vs. McClaughry** (1913) 207 Fed. 18; and in **O'Brien vs. McClaughry** (1913) 209 Fed. 816, and likewise spoke the same court in the Ninth Circuit in **Halligan vs. Wayne** (1910) 179 Fed. 112. But the appellant, supported by **Ex parte Peters** (C. C. W. D. Mo. 1880) 12 Fed. 461 (and this decision was made contrary to the court's opinion as to what the decision de novo should have been) and **Anderson vs. Moyer** (D. C. N. D. Ga. 1912) 193 Fed. 499, says "Yes."

The contention of the appellant is founded upon the theory that the so-called "same evidence" test of the identity of offenses should apply to this case; and if applied, it will show that the offense set out in the first count is not identical with that charged in the second count, consequently a separate and distinct punishment may be assessed for each. What is the "same evidence" test? It is, Would the proof of the facts necessary to

sustain the second indictment, have sustained a conviction under the former indictment? If so, the offenses in each indictment are identical; but if it **is necessary to prove more or different facts in one indictment than in the other there is no identity of offenses.** Applying this rule to the case at bar appellant states (Brief pp. 9 and 12):

"In the instant case proof of larceny is **required** to sustain a conviction under section 190, and not under 192. While proof of breaking into a post office is required to sustain a conviction under section 192 and not under 190." "In the instant case, on the contrary, defendants performed two distinct operations. They broke into the post office, intending to steal, and then actually committed the larceny."

So it will be seen that the same proof necessary to sustain the larceny charge would not sustain the charge of burglary and vice versa. And the conclusion is that the offenses are not identical.

There is only one flaw in that argument; and that is its major premise is false. The "same evidence" test is not the law as **applied in the actual decisions** of this Court, no matter what may be the language of **some** of the opinions. Nor is the "same evidence" test controlling in the instant case. If the "same evidence" test be logically applied to the facts in the decisions rendered by this Court on the question of double jeopardy, we would be thrown into a maze of hopeless conflict of cases and of countless thousands of nice and shadowy distinctions and exceptions. But there is a rule upon which all of the **decisions, not to speak of dicta,** may be clearly reconciled. It is simply: That separate punishments cannot be inflicted for **offenses of the same nature, committed at the same time or as a part of the same continuing criminal act.**

The question which immediately arises is: When are offenses, **by nature the same?** The answer is the simple one, that when each offense—as defined by the law—**has one or more indispensable elements which are identical,** the offenses are **by nature the same.** Consequently the test to be applied in ascertaining the "identity of the offenses" is not the "same evidence" theory, but the "same nature" criterion.

The rule just stated and contended for by the appellees is founded upon the humane principle prohibiting **double punish-**

ment by the same sovereign for the same criminal act. The constitutional inhibition against twice placing a man in jeopardy for the same offenses is but an expression of the principle against **double punishment** for that offense. If the Constitution protects the person from a second punishment for the **whole offense, it clearly means to absolve him from a second punishment for all the indispensable parts thereof.** For the whole is but the sum of all its parts—and the punishment of the whole is a punishment of each part. And to permit the prosecutor to first punish the whole offense and then separate it into its parts, and again punish each part is contrary to law, and to the humane policy of our law. As said by the Kentucky Court of Appeals: "The whole reason and philosophy of the law, as well as justice to the accused, require a different ruling." **Triplett vs. Commonwealth** (1886) 84 Ky. 193.

In reference to the "same evidence" theory, we find the following passage in I. Bishop, New Criminal Law Sec. 1062—discussing the very point involved in the instant case:

"Still to make a burglary thus double, and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law, and we have cases which refuse this **double punishment.** They proceed upon the highly reasonable ground that where criminal act has been committed, every part of which may be alleged in a single count in an indictment and proved under it, the act cannot be split into several distinct crimes, and a several indictment sustained as to each." (In the last sentence the Author has reference to the fact that burglary and larceny may be charged in the same count of an indictment and only one punishment may be inflicted. This shows that burglary and larceny are the same offenses "by nature" and will be discussed in this argument.)

There is ample authority for view here contended for, viz: that the **"same nature"** test should control the decision of this appeal.

It is true, as stated in the appellant's argument, that the same state of facts may violate two statutes, and each statute may impose a separate penalty for the violation. But whether these offenses are "identical" or the "same," depends upon **the elements (the nature) of the offenses themselves, and not upon the fact that two statutes have been infringed.** This is well illustrated by a comparison of the cases of **Grafton vs. United**

States (1907) 206 U. S. 333 and **Gavieres vs. United States** (1911) 220 U. S. 338.

In the **Grafton Case** the accused had been tried and acquitted by a general court-martial under the charge of **homicide**; and this Court held that that trial and acquittal was a bar to a subsequent trial on the same facts in a civil court for the higher crime of **assassination,** defined in Art. 403 of the Philippine Penal Code. Here two distinct laws were violated, the Articles of War and the Philippine Code; but this court was of the opinion that the **nature of the crimes** was the same. Consequently, there could be but one trial for them.

On the other hand in the **Gavieres' case** it was held that the same facts could be twice punished, because two distinct laws were violated. But there was not a single element—common in the essential ingredients of each crime. First, there was a conviction for the violation of a municipal ordinance in Manila, prohibiting **indecent conduct** in a public place. This court held (Mr. Justice Harland dissenting) that the first conviction was no bar to a subsequent trial for **insult to a public officer** in violation of the Philippine Penal Code. The **Grafton** Case was distinguished on the ground that in the **Giavieres'** Case, the offense covered by the penal code (Insulting Public Officials) **was not within the terms** of the offense under the Ordinance (Indecent Conduct in a Public Place.)

Thus this court must have stated by implication that in the **Grafton Case,** the offense of **homicide was** within the terms, of the offense of **assassination** under the penal code. This construction cannot stand under the "same evidence" test, for, by the very words of the Philippine Code, **more facts must be proved** to maintain an indictment for **"assassination,"** than were required to prove a **homicide** under the Articles of War. Furthermore, the information for the assassination did in fact make necessary allegations of fact, which were not alleged or necessary in the "homicide" charge. Yet, this Court held that this was double jeopardy,—and the "same evidence" test if applied would clearly lead to a contrary result. For to sustain the information of **"assassination"** under Art. 403 of the Philippine Code, the killing would have to be done "with treachery and deliberate premeditation"—whereas, in the **homicide** charge it alleged that there was an "unlawful killing."

The only basis for the decision is the sound one that the crimes are identical in **their nature,** i. e. they had one element in common which was indispensable to each, viz: a felonious killing. In this case it is not sufficient to say, as was said in the **Gavieres** case, that each offense "**had an element** not embraced in the other." For, clearly the offense of assassination had **an element** not embraced in the homicide—"treachery and deliberate premeditation."

The **decisions** of these two cases are perfectly consistent, and in absolute accord with the rule applied by the Court below in this case. In the **Grafton Case** there was a common element in fact and indispensable in law necessary to each offense,—viz: a felonious killing, and this rendered the offenses identical in their nature. The fact that one offense, as charged, embraced elements not found in the other was not controlling. In the **Gavieres Case,** on the other hand, **no element existed in either offense,** which was indispensable to the other. There was no common element in the two crimes. In the charge for public indecency the ordinance did not require the allegation of a single element which was necessary to sustain the charge of insulting a public officer. Nor in the latter charge was it necessary to state a single element which had been punished in the public indecency conviction.

The principle of the **Grafton Case** is peculiarly applicable to the instant case. Like the felonious homicide in the **Grafton Case,** the "intent to steal," etc., permeated the entire transaction and was indispensable to the **first** and to the **second** count of this indictment. The mere fact that the second count alleged an additional element of "taking" does not make the offenses unidentical. Any more than "treachery and deliberate premeditation" will make homicide a crime not identical with assassination.

The "same evidence" test is stated admirably in a Massachusetts decision; and this has been frequently cited and quoted by other courts; it is found in the appellant's Brief at Page 10. The case is **Morey vs. Commonwealth** (1871) 108 Mass. 433. It is contrary, both in decision and principle, to decisions and authorities laid down by this court.

The case was brought up by writ of error. Two indictments had been brought against Morey. The first charged him with unlawful cohabitation with A, from October 1, 1886 to August 1, 1887.

The second charged adultery with A, on January 1st, June 1st and August 1st, 1887. Upon the trial under the second he pleaded the conviction under the first as a bar. The plea was overruled, and the higher court held that there was no error, because the **offenses were not the same.** At page 434:

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and **if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."** That is the **principle** for which the case stands. Can anything be more inconsistent than this doctrine and the one which is set forth in **Grafton vs. United States, supra.** To state this **language,** and the **decision** of the **Grafton Case** is to express their utter incompatibility. No one can read the two cases and say that **their principles** can possibly be reconciled.

What was the actual decision in the Morey case? At pages 435 and 436 the court continues:

"The indictment for lewd and lascivious cohabitation contained no averment and required no proof that either of the parties were married, but did require proof that they dwelt or lived together, and would not be supported by proof of a single secret act of unlawful intercourse. **Commonwealth vs. Calef,** 10 Mass. 153. The indictment for adultery alleged and required proof that the plaintiff in error was married to another woman and would be satisfied by proof of that fact and of a single act of unlawful intercourse. Proof of unlawful intercourse was indeed necessary to support such indictment. But the plaintiff in error could not have been convicted upon the first indictment by proof of such intercourse and of his marriage, without proof of continuous unlawful cohabitation; not upon the second indictment by proof of such cohabitation without proof of his marriage. **Full proof of the offense charged in either indictment woud not, therefore, of itself have warranted any conviction upon the other."**

Not only is this irreconcilable in principle with **Grafton vs. United States, supra;** but it is also inconsistent in both **principle and decision** with **Ex parte Snow** (1887) 120 U. S. 274; and **Hans Nielson, Petitioner** (1889) 131 U. S. 176. Both of which illustrate the soundness, justice and consistency of the principle upon which the lower court proceeded in the instant case.

In the **Snow Case** three indictments were found against the defendant for unlawful cohabitation with more than one woman, under the Act of March 22, 1882. Each of these charges were alike, **except each covered a different period of time.** The first indictment alleged that the acts were done from January 1, 1883 to and through December 31, 1883. The second ranged from January 1, 1885 to and through December 31, 1885. And the third from January 1, 1884 to and through December 31, 1884. Defendant was found guilty upon each indictment and was sentenced to six months imprisonment and a fine of $300.00 under each indictment. It was held that only **one** sentence could stand in law; for, this was but a single continuing crime from the earliest day charged in any indictment to the latest day laid in any. Would proof of the same facts have sustained **all** or any two of these indictments? Obviously not—Because different periods of time were charged in each indictment. Then, upon what theory can the decision be upheld? Only upon the reasoning that by the VERY NATURE OF THE CRIMES CHARGED THEY WERE IDENTICAL. **It is because of the elements necessary to comply with the statutory definition of the crimes, and not the fact that the same proof would have supported each indictment, that made these offenses identical.** This is gathered from the following excerpt from the opinion:

"The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. **It is inherently, a continuous offense, having duration; and not an offense consisting of an isolated act.** That it was intended in that sense in these indictments is shown by the fact that in each the charge laid is that the defendant did on the day named, and 'thereafter and continuously;" and for the time specified 'live and cohabit with more than one woman, to-wit, with' the seven women named, and 'during all the period aforesaid' 'did unlawfully claim, live and cohabit with all of said women as his wives.' Thus, in each indictment, the offense is laid as a continuing one and a single one for all the time covered by the indictment; and taking the three indictments together there is charged a continuing offense for the entire time covered by all three of the indictments."

Now applying the language and principle of **Morey vs. Commonwealth, supra,** to the indictments of the **Snow Case,** it is readily seen that "full proof of the offense charged in either indictment would not, therefore, of itself have warranted any conviction upon the other." Yet this Court decided that since the

offenses charged in each of these indictments were by nature ("inherently") a continuous one, the court could inflict but one punishment.

In the **Nielson Case** we find a **decision** precisely contrary to the doctrine stated in the **Morey Case.** Two indictments were brought against Nielson, **one** charging him with unlawful cohabitation with A, between October 15, 1885 and May 13, 1888: the second, charging him with adultery with A on May 14, 1888. Defendant entered a plea of former conviction, to the second indictment. And this Court held that the offenses were identical and the plea should have been sustained. Who can say that the **same evidence** would have sustained a conviction under each of these indictments? Would "full proof" of the unlawful cohabitation between Nielson and A, during the period of time between **October 15, 1885 and May 13, 1888,** have sustained a conviction of "adultery" with A. on **May 14, 1888?** Obviously not.

In fact the Court in the Snow and Nielson cases did not apply the test of "same evidence" test, but refused to permit double punishment because the offenses in each indictment were "inherently" the same. **And they were rendered inherently identical because there were some indispensable elements in each which were also indispensable to the other.**

Note the reasoning of the **Nielson** decision:

"But be this as it may, it seems to us very clear that where as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." Is there any statement anywhere to be found which more clearly expresses the principle upon which this appeal should be decided?

There is the true rule of decision. It is easily and justly applicable to every decision made or to be made. And in the case at bar when the trial court in Ohio imposed the sentence on the first count for breaking into and entering the post office with intent to steal the property, it had punished appellees for one of the "various incidents" included in the second count, viz: the **intent to steal the property;** and it could not punish the appellees a second time for that **incident** without violating the Fifth Amendment to the Constitution of the United States.

There is another class of cases in which this doctrine is universally applied. It is where a conviction for **robbery** is a bar to a subsequent trial for **larceny** committed at the same time. And the converse is true. That is, a man may be tried but once for robbery or larceny done at the same time.

State vs. Lewis (N. Car. 1822) 2 Hawks 98.
State vs. Mikesell (1887) 70 Ia. 176.
State vs. Ingles (N. C. 1797) 2 Hayw. 4.

In the robbery charge an **element of fear, and force** must be shown in addition to the taking of the property. Whereas, in the larceny indictment no such element is essential. Consequently the same allegations and proofs will not sustain the indictments. "Full proof" of the **larceny** charge will not sustain a conviction for **robbery.** Therefore, if the "same evidence" principle were applied the courts should permit a separate conviction and sentence for each offense. But this rule is not applied and the courts have settled the doctrine that these offenses are **identical.** The principle upon which the cases rely is that although there is an element in robbery which is not required in larceny, the crimes are by nature identical, **because there is the common indispensable "incident" of unlawful taking in each offense. State** vs. **Mikesell, supra,** at p. 179.

The incorrectness and inaccuracy of the "same evidence" theory is again shown when we examine the cases of assault and battery where several blows are struck.

It is universally conceded that in the case of a prosecution for an assault and battery, where several blows are struck in the same transaction; a separate punishment cannot be inflicted for each blow. But if the court applies the test that the evidence necessary to maintain the separate indictments must be the same, in order to prevent double punishment, an indictment for each blow must be sustained. For it is obvious that the evidence necessary to prove blow No. 1 is not the same as that necessary to prove blow No. 2.

Upon what logical principle then do the courts refuse to allow separate indictments for the blows? The answer is the simple one found in the **Grafton, Nielson, Snow and robbery cases: That where the offenses are identical in nature the "same evidence" test is not applicable; and a conviction and punishment for one will bar a subsequent trial for the other, even**

though there might be some slight variation in the evidence necessary to support the two indictments. And to ascertain when the offenses are identical in nature the court need only apply the following question:

"Are there one or more identical elements or incidents, indispensable to satisfy the statutory definition of each crime?"

If the statutes require proof of the same ingredients in each crime the accused can be placed in jeopardy but once for **these ingredients,** although it be necessary to prove some additional elements and facts in order to sustain the second charge.

The statutory definition and elements of the offense are controlling. And upon this principle alone is it possible to reconcile **all** of the cases. It has already been pointed out that the **Nielson, Snow and Grafton Cases,** and the doctrine applied to the offenses or robbery and larceny and to assault and battery, can be sustained only upon this principle. And it is equally demonstrable that the cases of **Gavieres vs. United States** (1911) 220 U. S. 338; **Burton vs. United States** (1906) 202 U. S. 344; **Carter vs. McClaughry** (1902) 183 U. S. 365, all of which are relied on by the appellant, and all other cases may be reconciled with the principle as stated by the appellees herein.

We have already discussed the **Gavieres Case.** And upon an examination of the **Burton** and **Carter Cases,** it will be found that neither of these apply a different rule of **decision.**

In the **Burton Case** defendant was convicted, first for **agreeing to receive,** and second for **receiving** compensation as a Senator. He was also separately convicted for receiving compensation from two distant persons. To state these offenses is to prove that there is no **element** in common in them. There is not a single element found in the agreement to receive the compensation which is present in the actual receipt of the compensation. Consequently, there is no double punishment of any **"incident"** or element in either crime. Furthermore, in fact, four months had elapsed between the agreement and the receipt. And as to the separate punishment for receiving compensation from different persons; it is clear that it is no defense to a prosecution for receiving compensation from A, to say that defendant has been already punished for receiving compensation from B. Nothing is to be found in this case which conflicts with the decision of the court below in the instant case.

So in the case of **Carter vs. McClaughry,** where the accused was first punished for conspiracy to defraud the United States, and second, for causing false and fraudulent claims to be brought against the United States. No common element is found in the definitions of these two offenses. Consequently, there was no double punishment for any incident in either offense.

Upon the principle involved the Supreme Court of Georgia has ably expressed the true rule in **Bell vs. State** (1898) 103 Ga. 597:

"Where a person has been put in legal jeopardy of a conviction of an offense which is a necessary element in and constitutes an essential part of another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same act." (P. 402.)

This is law everywhere and to it the following supplement is to be added: **That where a person is put in legal jeopardy of a conviction for an offense which contains essential elements which are indispensable parts of another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same transaction, so as to render the "essential elements' in fact, the same.**

This is but a re-statement of the decisions and principles of **Hans Nielson, Petitioner, and Grafton vs. United States, supra.**

How does this rule apply to the case at bar?

In the instant case there was the same identical element in each offense charged and this element was indispensable to each offense, viz: the felonious intent to steal the property of the Post Office Department. It is by express provision in Section 192 of the Penal Code made indispensable to the charge of breaking into and entering the post office. And it was expressly charged in both counts of the indictment.

The felonious intent was necessary to the conviction on the larceny count.

Sorenson vs. United States (C. C. A. 8th Cir. 1909) 168 Fed. 785.

Consequently, the offenses are identical in law and in fact, under the rule as stated in the **Nielson Case.** And the appellees could not have been tried a second time for that identical incident—**the intent**—without being twice put in jeopardy for the same offense.

For under the first count they were tried for both the act of breaking into and entering and for the intent to steal the property—both of which were indispensable "incidents." They cannot again be tried for the same incidents even though the additional fact of a taking is alleged and proved.

As stated by **Waite, C. J.,** in his dissenting opinion in **Wilson, et al. vs. State** (1885) 24 Conn. 57:

"Whenever in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent, cannot be maintained."

And in **Munson vs. McClaughry** (C. C. A. 8th Cir. 1912) 198 Fed. 72, where this decision was "on all fours" with that of the lower court, in this case, page 74:

"A criminal intent to commit larceny of the property of the government is an indispensable element in each of the offenses of which the petitioner was convicted, and there can be no doubt that **where one attempts to break or breaks into a post-office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act."**

Unless the judgment in this case is allowed to stand the appellees are compelled to undergo a double punishment for the same indispensable part of each crime—the intent to steal. This is discussed in **Stevens vs. McClaughry** (C. C. A. 8th Cir. 1913) 207 Fed. 18, at page 21:

"Conceding, but not admitting, that the United States might have charged and upon conviction, have punished the separate offense of taking the four registered letters and embezzling their contents, its averment in the four counts which treat of these letters, of the intent to steal them and of their stealing **made that intent an issue under each count and an essential element of each offense charged,** and thus brought this case un-

der the rule and the authorities cited. In burglary and larceny committed at the same time the intent to break and enter is not essential to the offense of larceny, **but the intent to steal is indispensable to each offense.** So in the case at hand, the intent to embezzle is not essential to the offense of stealing a mail pouch and the letters, but under this indictment the intent to steal and the stealing is made by the pleadings as indispensable an element of the four offenses charged in the third, fourth, fifth, and sixth counts of the indictment as it is of the offenses charged in the first two counts.

"Counsel call attention to the conceded rule that charges of separate offenses of the same class may be joined in separate counts of the same indictment. But this rule and the practice under it does not detract from **the soundness or effect of the principle that two or more separate offenses** which are committed at the time and are parts **of a continuing criminal act inspired by the same indispensable felonious intent are susceptible of but one punishment."**

The case of **Halligan vs. Wayne** (C. C. A. 9th Cir. 1910) 179 Fed. 112, is the leading case in the national courts on the question at issue. The learned court in that case reviewed all of the authorities and reached the conclusion identical with that maintained by the lower court in the instant case.

The cases of **Ex parte Peters** (C. C. W. D. of Mo. 1880) 12 Fed. 461, and **Anderson vs. Moyer** (D. C. N. D. of Ga. 1912) 203 Fed. 499,—are examples of the contrary view. But the court in the **Peters Case** rendered its decision contrary to what it thought the law ought to be, relying upon its belief that it was following the weight of authority. This was a misconception and is so shown by a review of the authorities as made by **Halligan vs. Wayne, supra.** So in the **Peters Case** the underlying **feeling** of the Court was in accord with the principles stated by the appellees here, when it said that it would "be inclined to adopt" the strong reasoning of **Waite, C. J.,** in his dissent in **Wilson et al vs. State** (1855) 24 Conn. 57, **"if it were a question of first impression."**

In the **Anderson Case** the Court proceeded upon the major premise that the "same evidence" test was to be applied. And with this false premise it was naturally led to a false conclusion.

The **Halligan, Munson and Stevens Cases** were reaffirmed in **O'Brien vs. McClaughry** (C. C. A. 8th Cir. 1913) 209 Fed. 816

The truth of the rule is made manifest by applying to the practical method of prosecuting these offenses the rigid test of the "same evidence" rule. In the peculiar circumstances of these burglary and larceny cases, where the acts are so closely connected in point of time, it is the almost universal and invariable practice (and generally the necessary practice) to prove the **intent to commit larceny,** which is one of the indispensable incidents in the burglary charge, by using the **fact of the larceny as evidence of the intent.** And then the same evidence is used to **prove the charge of larceny.** Consequently, we have in the great majority of cases the **same evidence** to sustain each of the charges. And not only are there certain common indispensable elements of the two offenses which are identical, but the facts and evidence necessary to prove the offenses are identical.

There is another rule which makes the crimes of burglary and larceny the **same by nature.** And that is the fact that they may be joined in the **same count of the same indictment.**

United States vs. Yennie (D. C. So. D. of N. Y. 1896) 74 Fed 221.

State vs. McClurg (1891) 35 W. Va. 280.
Breese vs. State (1861) 12 Oh. St. 146.

And a general verdict of guilty will be presumed to be a conviction for burglary only; and a sentence for burglary only may be passed. In such a case the larceny is merged into the burglary.

In **State vs. McClung, supra,** it is said:

"The reason for thus framing an indictment in a dual form, * * * is that the definition of 'burglary' is breaking and entering with intent to commit an offense, **of which intent the actual commission is so strong evidence that the law has adopted it, and admits it to be equivalent to a charge of intent in the indictment, and therefore, the charge of the intent is supported by proof of the fact, though the reverse would not be true."**

But when conviction and punishment are had under this indictment no subsequent prosecution can be brought for the

larceny. This principle of the merger of the larceny into the burglary is founded on the fact that the actual larceny merely supplies the necessary intent to comply with the definition of burglary. But in such a case there is no more reason to say that a general verdict of "guilty" is a conviction of the burglary charge, than of the larceny charge or of both burglary and larceny. And clearly it would seem that if the jury returned a verdict as follows: "We the jury find the defendant guilty of both burglary and larceny," under the foregoing authorities the court could pass but **one sentence,** and that for **burglary.**

Consequently, where these crimes are charged in one count, the larceny is merged in the burglary, and vice versa. And in the eyes of the law the defendant has committed **only one punishable offense.**

If this is true where the prosecution has elected to proceed under one count of an indictment, it is equally applicable to the same facts and charges if separated into **two** counts. **To hold otherwise is to say that a mere twist of the allegations may doubly punish a man for the same intent, for the same acts and for the same offense, all based upon the same evidence.**

And it must follow that although in the instant case the appellees could not have been punished for the **stealing** of the property, if the first count had charged a breaking into and entering **and a stealing;**—nevertheless, by changing the phraseology by inserting the words "with intent of" before the word "stealing;" and then by adding another count to the indictment in which the stealing is alleged, the prosecutor may doubly punish them. And this would be true although it is the universal practice to prove both of these counts **upon the same evidence**—that is, permitting the actual stealing to supply **the proof of the intent** in the first count, and of the full offense in the second.

Bishop, New Criminal Law, Sec. 1062.

"If in the night a man breaks and enters a dwelling house with intent to steal therein, and steals, he may be punished for two offenses or one, at the election of the prosecuting powers. An allegation of breaking, entering and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a a first count may set out a breaking and entering **with intent to steal,** and a second may allege the larceny

as a separate thing, and thereon the defendant may be convicted and sentenced for **both.** Therefore, a jeopardy on an indictment charging the burglary as committed by breaking and entering with intent to steal is no bar to a prosecution for the actual theft. So, almost unanimously, are the authorities; and they do not differ in principle from the majority doctrine in some other offenses. **Still, to make a burglary thus double, and punish it twice, first as burglary and second as larceny, hardly accords with the humane policy of our law, and we have cases refusing this double punishment. They proceed on the highly reasonable ground that 'where a criminal act has been committed, every part of which may be alleged in a single count in an indictment and proved under it, the act cannot be split into several distinct crimes, and a several indictment sustained upon each.' In reason,** where the law permits a defined combination of things to be punished as one crime, how can a prosecutor select from this whole a part, and punish it precisely as it would the whole, then take up the rejected part and punish it, and deny that the latter is 'the same offense,' with the former?"

Waite, C. J. dissenting in Wilson vs. State (1885) 24 Conn. 57. "I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that where a criminal act is committed, every part of which may be alleged in a single count in an indictment, and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained upon each. And whenever there has been a conviction for one part, it will operate as a bar to any subsequent proceedings as to the residue."

The **effect of the** reversal of this case should be given a passing notice. To apply strictly the "same evidence" test to this class of cases will open the door to the prosecuting officers to inflict untold penalties upon violators, by merely placing, in astutely drawn indictments, allegations which will vary the required **evidence slightly, but leave the facts substantially the same.**

The effect of this is stated in **Ex parte Snow** (1887) 120 U. S. 274, above referred to, where the same continuing offense was divided into three periods of time and a separate indictment brought to cover each period. And, of course, the "same evidence" required to support one indictment would not have sustained another. But this Court refused to permit the prosecu-

tion to split this offense into parts and inflict separate punishments. In the Opinion Mr. Justice Blatchford said:

"The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonments for seventeen and a half years and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on **ad infinitum**, for smaller periods of time. It is to prevent such an application of penal laws that **the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for purposes of indictment or prosecution, prior to the time the prosecution is entered.**"

Note that the **"character"** of the offense is controlling and not the fact that the "same evidence" necessary to support one indictment will not support a second indictment. So in the **"character"** of the offense now before the court if the "same evidence" test is to be applied the prosecuting officers may indict, try, convict, and punish a man for at leasct 14 offenses with 53 years' imprisonment and fines amounting to $74,200. This may be done by a slight twist and variance in the allegations of the counts. And in some instances, as in the instant case, the proof of all these allegations shall in practice be identical.

First. Under Sec. 192 of the Penal Code there may be a breaking into and entering a post office building with intent to commit larceny or other depredation.

Second. Under Sec. 189, an injury to mail bags, drawing staples, etc., with the same intent.

Third. Under Sec. 190, a stealing of property of the Post Office Department.

Fourth. Under section 191, possessing a key with the same intent.

Fifth. Under Sec. 194, stealing, etc., mail matter.

Sixth. Under Sec. 46, embezzling, stealing, etc., property of the United States.

Seventh. Should there be more than one defendant. Under

Section 47. To each of the foregoing offenses must be added the additional offense and punishment for conspiracy.

All of these offenses may be committed in one transaction, —as one continuing criminal act inspired by the same criminal intent. And it is perfectly obvious that all the proof, necessary to sustain these indictments and cause the infliction of these well-nigh incalculable penalties, would be, a common plan, an entry with a key into a post office building, a slight mutilation of a mail bag, the taking of one letter and a stamp—all done at one place, at one time and with one purpose.

It may be argued that the question of the policy of such harsh rules of punishment under these statutes is for the legislature—for Congress—to determine; and that the Courts do not investigate such questions. The soundness of such an argument is conceded, but it does not relieve the courts of their duties to ascertain the intent of the legislature; and having ascertained that intent, to investigate the power of the legislature, under the Constitution, to execute that intent. For neither Congress nor the courts can place a man twice in jeopardy for the same offense. And if two statutes seek to punish a man twice for **alleged offenses,** which are **in law the same,** one of the enactments must fall.

Consequently it is no answer to the argument of the court below in this case, to say that the **statutes** authorize two distinct punishments for these offenses. The offenses being **identical in law,** having the same indispensable incidents included in each, the Constitution forbids the assessment of but one penalty.

CONCLUSION.

The offenses, charged in the counts of the indictment being the same, the court below upon the application for habeas corpus properly ordered in discharge of appellees at the expiration of the sentence on the first count. The order of the Court should be affirmed.

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March, 1915.

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